FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

December 7, 1995

DOCKET NO. 94-03

DORLAND MANAGEMENT, INC.

v.

NEDLLOYD LIJNEN B.V. D/B/A NEDLLOYD LINES

SETTLEMENT APPROVED; COMPLAINT DISMISSED

After over a year and one half of litigation and after extensive discovery and prehearing activity, complainant and respondent have reached an amicable settlement and ask that it be approved. As discussed below, it is hereby approved and the complaint is dismissed.

The parties have submitted a detailed joint memorandum in support of their proposed settlement which, among other things, provides a detailed history of this proceeding. As they explain, the case began with the filing of a complaint, which was served on respondent on February 22, 1994. The complainant is Dorland Management, Inc., a

company which ships synthetic resin from Houston, Texas and other U.S. ports to ports in Nigeria with its principal place of business located in New York City. The respondent is Nedlloyd Lines, a vessel operating common carrier in the foreign commerce of the United States with its head office in the Netherlands. In its complaint, Dorland alleged that Nedlloyd had refused to give Dorland a service contract on the same essential terms as that given to another shipper of synthetic resin, claiming that Nedlloyd lacked sufficient capacity and that Dorland was not similarly situated to the other shipper. Dorland claimed that this conduct on the part of Nedlloyd violated sections 8(c), 10(b)(3), 10(b)(5), and 10(b)(12) of the Shipping Act of 1984. Dorland asked for money damages (reparations) plus interest and attorney's fees, a cease and desist order, and for other remedial orders. In addition, as authorized by section 10(b)(5), Dorland asked for double damages. As noted, respondent Nedlloyd claimed that Dorland was not similarly situated to the contract shipper and that Nedlloyd lacked sufficient vessel capacity to give Dorland the same contract. Moreover, Nedlloyd instituted its own counterclaim, alleging that Dorland owed Nedlloyd for short-payment of Nigerian port surcharges, claiming that Dorland had thereby violated section 10(a)(1) of the 1984 Act. The Commission's Hearing Counsel (now the Bureau of Enforcement) intervened for the limited purpose of arguing that a defense claiming lack of capacity was invalid as a matter of law.

Subsequently complainant and respondent commenced extensive discovery under the Commission's rules, including depositions and document production. The process consumed a large part of 1994. The discovery focused on all aspects of the complainant's case and respondent's defenses. Specifically, the parties explored Dorland's historic cargo volumes

over the trade lane and analyzed inland transportation factors, available sources of supply, and potential markets for the synthetic resin. The parties also explored the basis for Nedlloyd's responses to Dorland's requests for access to the service contract, vessel operations, feeder services, and made an analysis of capacity available to Nedlloyd during the relevant time period. Counsel also took depositions of numerous party and non-party witnesses.

Upon the conclusion of discovery, the parties engaged in extensive settlement negotiations. Their negotiations involved an exchange of opinions concerning the facts and application of the law to those facts. Positions of the parties hardened, however, and they were unable to bridge the gap between Dorland's demand and Nedlloyd's offer. At the request of counsel, I advised them that I would assist them in trying to reach settlement consistent with modern rules of procedure codified in law and developed in cases. As I advised the parties, the Commission employs any means that could help parties reach settlement or shorten litigation and has amended its rules of procedure to incorporate the Administrative Dispute Resolution Act (ADR) of 1990, 5 U.S.C.A. sec. 571 et seq.; see *Rules of Practice and Procedure; Alternative Dispute Resolution,* 26 SRR 1032 (1993); *Alternative Dispute Resolution, Policy Statement,* 58 Fed. Reg. 38651 (July 19, 1993); 46 CFR 502.91(a); 46 CFR 502.91(d), as amended. See also *Delhi Petroleum v. U.S. A & G/Australia-New Zealand Conference,* 24 SRR 1129, 1131 n. 6 (I.D., F.M.C. notice of finality September 19, 1988); and other authorities cited in my letter to the parties, dated September 8, 1995.

In response to my advice, the parties submitted informal statements of their factual claims and contentions to me confidentially, consistent with the provisions of the ADR Act.

At a special conference held on October 30, 1995, the parties discussed their claims and defenses with me and sought my tentative views of the strengths of these claims and defenses so that they could evaluate better the risks of continued litigation. This technique is a variation of the summary-trial technique recommended under the ADR Act, and was used in *Delhi Petroleum,* cited above, and in *Great White Fleet, Ltd. v. Southeastern Paper Products Export, Inc.,* 26 SRR 1487, 1489 (ALJ, FMC notice of finality, Sept. 21, 1994).

Upon completion of my review and advisory opinion, counsel further advised their clients regarding the risks of continued litigation and future costs of same. The parties were particularly concerned that there would have to be extensive pre-trial preparation and that non-party witnesses would have to be called from the Netherlands, Texas, and Nigeria, with complications as regards Nigerian witnesses because of current strains in the relationship between Nigeria and the United States. Thereafter, the parties reached agreement and have submitted their settlement agreement for approval.[1]

Discussion and Conclusions

The settlement agreement proposed by the parties consists of a carefully drafted document containing an explanatory preamble followed by 11 numbered paragraphs. In it, the parties summarize the history of the case, their desire to terminate the litigation, and release each other from present and further related claims. There is no admission of liability by either party, a customary provision in settlement agreements. It becomes

[1]Hearing Counsel, being an intervenor limited to a single legal issue, declined to participate in the settlement discussions.

effective by its terms when executed by the parties and approved and accepted by the Commission. Nedlloyd agrees to pay Dorland a certain sum to settle Dorland's damage claim and drops its own counterclaim against Dorland for alleged underpayment of the Nigerian port surcharges.[2]

The parties have provided ample authority supporting approval of their proposed settlement. Thus they cite the Administrative Procedure Act (APA), 5 U.S.C. sec. 554(c)(1), which requires agencies to give interested parties an opportunity to submit offers of settlement when "time, the nature of the proceeding, and the public interest permits." They cite the legislative history to this particular provision of the APA encouraging agencies to approve informal settlements of cases before them. See Senate Committee on the Judiciary, Administrative Procedure Act--Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess. 24 (1946). They also cite a court decision, often cited in settlement cases, which encourages the use of the APA settlement provisions to "eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest." *Pennsylvania Gas & Water Co. v. Federal Power Commission,* 463 F.2d 1242, 1247 (D.C. Cir. 1972).

The Commission has long recognized that the law strongly favors settlements, has codified the APA provision in its rules of procedure (46 CFR 502.91(b)), and has approved

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[2]The amount of the payment has been filed in confidence under the confidential procedures set forth in the Commission's rules. See 46 CFR 502.119. In previous cases confidential treatment has been given to settlement agreements regarding the specific amounts of payments when parties requested such treatment as an aid to entering into the settlement. See *International Association of NVOCCs v. Atlantic Container Line et al.,* 25 SRR 1607, 1609 (ALJ), F.M.C. notice of finality, September 6, 1991; *Accord Craft Co., Ltd. v. ANERA,* 26 SRR 1385 (ALJ F.M.C. notice of finality, April 20, 1994); see also *In Re Franklin Nat'l Bank Securities Litigation,* 92 F.R.D. 468 (E.D.N.Y. 1981), affirmed as *FDIC v. Ernst & Ernst,* 677 F.2d 230 (2d Cir. 1982). As provided by Rule 119(c), however, "any information designated as confidential may be used by the [ALJ] or the Commission if deemed necessary to a correct decision in the proceeding."

settlements in countless cases involving a wide variety of sections of the 1916 and 1984 Shipping Acts. Among the many such cases discussing the policy favoring settlements are *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505, 513-514 (18 SRR 1085, 1092 (1978); *Del Monte Corp. v. Matson Navigation Co.*, 19 SRR 1037, 1039 (1979); *Great White Fleet, Ltd. v. Southeastern Paper Products Export, Inc.*, cited above, 26 SRR at 1488-1489; *Kuehne & Nagel, Inc.--Freight Forwarder License*, 20 SRR 1533, 1539-1541 (I.D., F.M.C. notice of finality, October 13, 1981); *Behring International, Inc.--Independent Freight Forwarder License No. 910*, 20 SRR 1025, 1032-1034 (1981).

Parties usually agree to settle their disputes because of economic considerations, i.e., if the parties believe it would be more costly in terms of legal expense to litigate a dispute to a successful conclusion than to pay or receive something less than the amount claimed, the parties will usually decide to settle. Also, the parties weigh the respective strengths and weaknesses of their claims and defenses and the risks of litigation and reach a considered judgment as to the amount of payment in settlement that would be prudent and economical in the long run. See discussion of these principles in *Old Ben*, cited above, 21 F.M.C. at 513-514; *Delhi Petroleum Ptd. Ltd.*, cited above, 24 SRR at 1134; *Perry's Crane Service v. Port of Houston Authority*, 22 F.M.C. 31, 34 (ALJ, F.M.C. notice of finality, 22 F.M.C. 30 (1979). Although the Commission does not rubber stamp proffered settlements, it approves them if they do not appear to violate some law or public policy, and the amount of the settlement payment is left to the good-faith negotiations of the parties involved without disturbance by the Commission. See *CDM International v. Vencaribe, C.A.*, 26 SRR 78 (ALJ,

F.M.C. notice of finality, Nov. 6, 1991), and cases cited therein; see also *Great White Fleet, Ltd. v. Southeastern Paper Products Export, Inc.,* cited above, 26 SRR at 1488.

I find that the proposed settlement agreement fully accords with the principles and policies of the law and of the Commission favoring settlements. If this case were to continue into further litigation, it appears that the parties would have to undergo detailed, laborious examination of hundreds of shipments made by Dorland to Nigeria and attempt to measure the quantum of damages suffered, if any, because Dorland had to ship via tariff rates or rates of other carriers from various U.S. ports that were higher than those provided in the service contract to which Dorland was denied access. Counsel represented to me that such a task would require detailed scrutiny of volumes of shipping documents with related testimony, plus testimony relating to the issue of whether Dorland was similarly situated to the favored shipper. The matter of proof of alleged damages is not a simple one but requires adherence to certain standards under the law of damages relating the type of evidence adduced, reasonable certainty, showing of actual financial injury, etc. See *California Shipping Line, Inc. v. Yangming Marine Transport Corp.,* 25 SRR 1213, 1230 (1990). It is obvious that the costs of such endeavors would very likely offset whatever benefits would accrue to the prevailing party if formal litigation were to continue.

I conclude therefore that the parties, with the assistance of able counsel, have acted prudently in cutting this litigation short by reaching a settlement agreement after careful consideration of the risks and costs of further litigation. Their settlement agreement fully

accords with the principles and policies of the law and the Commission favoring settlements and should be approved. It is therefore approved and the complaint is dismissed.

Norman D. Kline
Administrative Law Judge